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MARITAL STRESS OR GROUNDS FOR DIVORCE? RE-THINKING THE RELATIONSHIP BETWEEN R2P AND INTERNATIONAL CRIMINAL JUSTICE

ABSTRACT. This article analyzes the relationship between R2P and international criminal justice. Both projects draw on similar foundations, such as 'sovereignty as responsibility', a humanity-based defence of international authority and complementarity-oriented response schemes to atrocity crimes. In past years, they have become subject to a number of common criticisms that are typical of other forms of international humanitarianism: application of double standards, assertion of power under the label of human rights and communitarian conceptions of international society or mediation of victims without agency. This contribution draws on an analogy to family law, namely idea of partnership and marriage, to analyze the *status quo* of the relationship. It argues that the coupling of these two traditions has not received enough attention in the emergence and treatment of R2P. It shows that it is a 'marriage' based on pragmatism and without contract. It investigates existing discourse and interaction problems. It claims that there is a need for greater distinction between R2P and international criminal justice, in order to respect their autonomy and mutual virtues. Integration and mainstreaming carries risks. Both strands of action share partly different goals and methodologies. None of the two should be viewed as a tool at the service of the other. Instead, it is more helpful to develop interaction in specific areas. Synergies exist in relation to specific functions, such as atrocity alert, norm expressivism and compliance. These communalities should be reinforced.

I INTRODUCTION

The Responsibility to Protect (R2P)[1] exists for more than a decade. Since 2005 it is an official concept in United Nations doctrine.

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[1] The literature on R2P is rapidly growing. See e.g., G. Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Washington, DC:

Opinions on the concept differ fundamentally. Some regard R2P as "the most dramatic normative development of our time"[2] or a new *grundnorm* of the international legal order (e.g., Dworkin,[3] Peters[4]). Others caution against its ambivalence, problems and risks. The importance of R2P can be assessed by the number of critiques that it has been exposed, which range from normative, conceptual and institutional criticisms to Third World and gender based-strands of

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Footnote 1 continued
Brookings Institution Press, 2008); A. J. Bellamy, *The Responsibility to Protect: The Global Effort to End Mass Atrocities* (Cambridge: Polity Press, 2009); J. Pattison, *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* (Oxford: Oxford University Press, 2010); A. Orford, *International Authority and the Responsibility to Protect* (Cambridge: Cambridge University Press, 2011); W. Andy Knight and Frazer Egerton (eds.), *The Routledge Handbook of the Responsibility to Protect* (New York: Routledge, 2012); P. Cunliffe (ed.), *Critical Perspectives on the Responsibility to Protect: Interrogating Theory and Practice* (New York: Routledge, 2011); Z. Genteri (ed.), *An Institutional Approach to the Responsibility to Protect* (Cambridge: Cambridge University Press, 2013). See also C. Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101 *American Journal of International Law* 99; A. J. Bellamy, 'The Responsibility to Protect—Five Years On' (2010) 24 *Ethics & International Affairs* 143–169; G. Evans, 'The Responsibility to Protect: An Idea Whose Time Has Come . . . and Gone?' (2008) 22 *International Relations* 283–298; E. Strauss, 'Bird in the Hand is Worth Two in the Bush—On the Assumed Legal Nature of the Responsibility to Protect' (2009) 1 *Global Responsibility to Protect* 291; L. Glanville, 'The Antecedents of "Sovereignty as Responsibility"' (2011) 17 *European Journal of International Relations* 233; D. Chandler, 'Unravelling the Paradox of the Responsibility to Protect' (2009) 20 *Irish Studies in International Affairs* 27–39; F. Mégret, 'Beyond the 'Salvation' Paradigm: Responsibility To Protect (Others) vs the Power of Protecting Oneself' (2009) 40 *Security Dialogue* 575–585; E. C. Luck, 'Building a Norm: The Responsibility to Protect Experience' in R. I. Rotberg (ed.), *Mass Atrocity Crimes: Preventing Future Outrages* (Washington, DC: Brookings Institution Press, 2010) 108–127; E. C. Luck, 'Sovereignty, Choice, and the Responsibility to Protect' (2009) 1 *Global Responsibility to Protect* 10–21.

[2] R. Thakur and T. G. Weiss, 'R2P: From Idea to Norm – and Action?' (2009) 1 *Global Responsibility to Protect* 22.

[3] See R. Dworkin, 'A New Philosophy for International Law' (2013) 41 *Philosophy & Public Affairs* 2–30.

[4] A. Peters, 'Humanity as the Å and ′Ω of Sovereignty' (2009) 20 *European Journal of International Law* 513–544.

critique.[5] Some have even proclaimed its alleged death as a functional concept, after Libya[6] or in the face of inaction relating to Syria.[7] The sheer amount of discussion of the concept, its incremental application in UN practices (e.g., fact-finding, human rights) and policy, and attempts to improve its functioning (e.g., Responsibility While Protecting), suggest that reports about the "death of R2P" are greatly exaggerated.[8] The discussion on R2P is sometimes reminiscent of the Tower of Babel. Much of the controversy is rooted in different understandings of the concept or focus on specific sites of debate.

In existing discourse, little attention has been devoted to some of the founding premises of the concept, namely the link between responsibility under R2P and international criminal justice.[9] R2P

[5] For critiques of different aspects of R2P, see D. Chandler, 'The Responsibility to Protect: Imposing the Liberal Peace' (2004) 11 *International Peacekeeping* 59–81; id., 'R2P or Not R2P? More Statebuilding, Less Responsibility' (2010) 2 *Global Responsibility to Protect* 161; A. Bellamy, 'Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq' (2005) *Ethics and International Affairs* 31–53; C. Focarelli, 'The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine' (2008) 13 *Journal of Conflict and Security Law* 191; M. Mamdani 'Responsibility to Protect or Right to Punish?' (2010) 4 *Journal of Intervention and Statebuilding* 53–67; L. Hall and L. J. Shepherd, 'WPS and R2P: Theorising Responsibility and Protection', in S. E. Davies, Z. Nwokora, E. Stamnes and S. Teitt (eds.), *The Responsibility to Protect and Women, Peace and Security* (Leiden: Brill, 2013) 53–80; R. Paris, 'The "Responsibility to Protect" and the Structural Problems of Preventive Humanitarian Intervention' (2014) 21 *International Peacekeeping* 569–603.

[6] See D. Rieff, 'R2P, R.I.P.', New York Times, 7 November 2911, at http://www.nytimes.com/2011/11/08/opinion/r2p-rip.html?pagewanted=all&_r=0.

[7] M. Newton, 'R2P is dead and done' due to response to Syria', 16 September 2013, at http://www.vanderbilt.edu/jotl/2013/09/newton-%E2%80%9Cr2p-is-dead-and-done%E2%80%9D-because-of-response-to-syria/.

[8] For a discussion, see C. Stahn and C. Harwood, 'Why Reports about the 'Death of R2P' May be Premature: Links between the Responsibility to Protect and Human Rights Fact-Finding' (2014) 3 ESIL Reflection, at http://www.esil-sedi.eu/fr/node/608.

[9] For an exception, see F. Mégret, 'ICC, R2P, and the International Community's Evolving Interventionist Toolkit' (2010) 21 *Finnish Yearbook of International Law* 21–51; S. Nouwen, 'Complementarity in Practice: Critical Lessons from the ICC for R2P' (2010) 21 *Finnish Yearbook of International Law* 53–64; M. Kersten, 'A Fatal Attraction? The UN Security Council and the Relationship between R2P and the International Criminal Court', in J. Handmaker and K. Arts (eds.), *International Law and the Politics of Justice* (Cambridge: Cambridge University Press, forthcoming); E. F. Defeis, 'The Responsibility to Protect and International Justice' (2011) 10 *Hofstra Journal of International Business and Law* 91.

emerged in the tradition of just war theory and intervention.[10] One of its trademarks is its mix of moral duties and interventionist response schemes with notions of international criminal justice.[11] R2P has synergies with principles of protection and humanitarian action[12]. It is built on ideas of prevention, protection and remedial response that are typical of humanitarian action.[13] The underlying principles do not necessarily coincide with goals of international justice. International criminal justice is sometimes associated with a claim to represent humanity.[14] But imperatives of neutrality and purposes of protection of victims are at best secondary considerations. Justice intervention is guided by particular objectives, such as the determination of accountability and the independence of justice (e.g., prosecutorial and judicial independence). It involves different goals and prioritizations than human rights advocacy or humanitarian relief (e.g., allocation of individual criminal responsibility, due process protection etc.). It is typically perpetrator-centred, rather than victim-focused, and targeted in focus. In the World Summit Outcome Document, the two projects have been paired with each other through the focus on atrocity crimes, without deeper reflection on the merger of these distinct traditions.[15]

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[10] See International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001), at http://responsibilitytoprotect.org/ICISS%20Report.pdf (hereinafter ICISS Report).

[11] See ICISS Report, paras. 4.18–4.43 (relying on just war theory criteria, such as ''just cause'' and ''right intent'').

[12] Humanitarian action is generally associated with the principles of humanity, impartiality and neutrality. See H. Haider, *International Legal Frameworks for Humanitarian Action: Topic Guide* (Birmingham, UK: GSDRC, University of Birmingham, 2013), at 6.

[13] See e.g., 'ICRC Protection Policy: Institutional Policy' (2008) 90 *IRRC* 751, 759.

[14] See the preamble of the ICC Statute, which speaks of crime that that shock 'conscience of mankind'. See also generally J. Hoover, 'Moral Practices: Assigning Responsibility in the International Criminal Court' (2013) 76 *Law and Contemporary Problems* 263, 285; R. Teitel, *Humanity's Law* (New York: Oxford University Press, 2011).

[15] See UNGA, 'World Summit Outcome Document' (2005) UN Doc. A/RES/60/1, para. 138. See also J. E. Alvarez, 'The Schizophrenias of R2P' in P. Alston and E. Macdonald (eds.), *Human Rights, Intervention, and the Use of Force* (Oxford: Oxford University Press, 2008) 276.

The reasons for this merger are both, functional and emotive. They go beyond rational choice or *realpolitics*. International criminal justice provides a strategy and language that is appealing to the enforcement of R2P. It offers the doctrine a normative grounding in law that mitigates biases against R2P. The use of criminal law semantics shifts the focus from subjective moral and political choices to universally defensible interests. Moreover, it strengthens the very assumption that R2P entails a legal nucleus. But a too close alignment may actually compromise the cause and perception of justice. This has become evident over past years. In the eyes of those affected by intervention, R2P and international criminal justice have become vulnerable to some of the same types of criticism that have voiced against coercive forms of transformative humanitarianism over decades: selectivity and application of 'double standards', creation of new types of 'victimhood' without agency, and empowerment of international authority under the guise of human rights.[16]

This contribution draws on a family law analogy, namely the idea of partnership and marriage, to analyze the *status quo* of the relationship.[17] It argues that the coupling of these two traditions has not received enough attention in the emergence and treatment of R2P. It first examines the emergence of the relationship. It argues that it was a marriage out of pragmatism and moral appeal. It then analyzes the premises of the relationship, i.e. assumptions regarding the roles of the partners. It investigate existing discourse and interaction. Based on this, it inquires to what extent these relational problems provide a ground for divorce, as argued by some (e.g., Chandler[18]) or a cause for mutual 'duties of care'.

[16] For a powerful R2P critique, see A. Branch, 'The Irresponsibility of the Responsibility to Protect in Africa', in Cunliffe (n 1 above), 103, 115. See also P. Cunliffe, 'Dangerous Duties: Power, Paternalism and the 'Responsibility to Protect'' (2010) 36 *Review of International Studies* 79. For an ICC critique, see P. McAuliffe, 'From Watchdog to Workhorse: Explaining the Emergence of the ICC's Burden-sharing Policy as an Example of Creeping Cosmopolitanism' (2014) 13 *Chinese Journal of International Law* 259.

[17] Mégret speaks of international criminal justice as a 'responsible partner' of R2P. Mégret (n 9 above) at 29.

[18] See D. Chandler, 'Born Posthumously: Re-Thinking the Shared Characteristics of the ICC and R2P' (2010) 21 *Finnish Yearbook of International Law* 1–9.

II A MARRIAGE OUT OF PRAGMATISM AND MORAL APPEAL

At the outset, it is useful to look back at the mating phase, i.e. the beginning of the affair. Both international criminal justice and R2P are modern articulations of ideas that have been inherent in international law for centuries. Both of them gained acceptance because they combined claims for a 'relative' understanding of state sovereignty with re-affirmations of state power, or even 'deference to sovereignty'.[19] The formation of R2P was visibly driven by gradual shifts away from 'rights-based' approaches towards intervention[20] and growing enthusiasm over the nexus between peace, justice and human rights at the end of the 1990s.[21] Originally, there were different conceptions of R2P. The atrocity-crime based vision gained acceptance in UN negotiations in 2005. It was assumed that R2P and international criminal justice share sufficient identity features to be connected. The contours, limits and risks of that relationship received limited attention.

2.1 *Diverse Identities*

R2P and international criminal justice share synergies. They are normative projects with certain protective and behavioral purposes. They fit partly within a strand of transformative humanitarianism that has gained ground over the past century.[22] They both set out to

[19] Mégret (n 9 above), at 36. This is reflected in the primary responsibility of States under para. 138 of the World Summit Outcome Document and the complementarity regime of the ICC. For an understanding of complementarity as responsibility, see C. Stahn, 'Taking Complementarity Seriously: On the Sense and Sensibility of ''Classical'', ''Positive'' and ''Negative'' Complementarity', in C. Stahn and M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press, 2011) 233–281.

[20] Rights-based approaches towards humanitarian action became a prominent feature in the 1980's with the invocation of the ''*droit d'ingerence*'' by NGOs in the Biafra crisis. See D. Chandler, 'The Road to Military Humanitarianism: How the Human Rights NGOs Shaped A New Humanitarian Agenda' (2001) 23 *Human Rights Quarterly* 678–700.

[21] See also Chandler (n 18 above), at 6 (''they were seen to be symbols of the global cosmopolitan order of liberal rights and justice, which the 1990s appeared to promise''). For a critique, see also M Koskenniemi, 'Human Rights Mainstreaming as a Strategy for Institutional Power' (2010) 1 *Humanity* 47–58.

[22] There are different strands of humanitarianism, the classical 'samaritan' model associated with the humanitarian movement (based on humanity, neutrality, im-

protect victims from harm. They ultimately seek to promote responsible use of sovereign power by governments.[23] Moreover, they coincide in their ambition to outlaw and ban intolerable human conduct, through prevention and attribution of responsibility for action or inaction.

The rapid growth and practice of international criminal justice over the past decades has provided a normative impetus for the development of R2P.[24] But the deeper question to what extent international criminal justice and R2P actually share common characteristics has not been explored in any great depth. The two projects enjoy separate identities.

R2P is an umbrella concept. It draws on ideas and influences from different areas. The main idea of 'sovereignty as responsibility' is grounded in human rights and duty-based conceptions of State authority. The response scheme (i.e. remedying suffering of others) is influenced by just war theory and the humanitarian tradition. The remedial component (e.g., prevention and reaction, with an aversion towards unilateralism) is strongly rooted in international institutionalism and the cosmopolitan tradition.[25] Each of these dimensions has a certain grounding in international law. The claim that sovereign authority is answerable internally is rooted in human rights law and standards of democratic governance. The idea that violations of duties entail external responsibility is grounded in the law of State

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Footnote 22 continued
partiality), and a more (human rights) driven form which is in essence 'transformative' in nature. The dilemma of the latter is that it requires a fundamental redefinition of humanitarian principles. See generally M. Barnett, *Empire of Humanity: a History of Humanitarianism* (Ithaca and London: Cornell University Press, 2011). The ICC bears traces of this. The 'samaritan' analogy does not work fully since ICC engagement is party- and interest driven. Victim protection and participation is tied to the case/situation shaped by the OTP. ICC action fits partly within the tradition of transformative humanitarianism and its dilemmas which require justification (e.g., based on acceptance of authority, expert knowledge, accountability etc.).

[23] See also Mégret, who qualifies R2P and the ICC as ''projects of making good sovereigns''. Mégret (n 9 above), at 38.

[24] D. Scheffer, 'Atrocity Crimes: Framing the Responsibility to Protect', in R. H. Cooper and J. V. Kohler (eds.), *Responsibility to Protect: The Global Moral Compact for the 21st Century* (New York: Palgrave MacMillan, 2009) 77–98, 80–81.

[25] On the diverse nature of R2P, see Alvarez (n 15 above).

responsibility, humanitarian duties[26] and concepts of solidarity and care.[27] Specific response schemes, such as prevention and reaction, can be traced back to specific treaty regimes (e.g., Genocide Convention[28]), Charter mechanisms and limits to non-intervention (e.g., peace and security under the UN Charter, African Union). Constraints may be derived from *jus ad bellum* and *jus in bello* (e.g., proportionality, principle of distinction).

Modern international criminal justice emerged in the tradition of peace-maintenance. But it shares distinct normative premises. It protects specific human rights (e.g., defendants' rights) and pays increasingly tribute to victims. It is less concerned with the idea of State responsibility for violations or State 'failure'. It has typically fought for the emancipation of individual criminal responsibility from the responsibility of the State, as reflected in the (too often repeated, yet continuously valid) Nuremberg *dictum* that ''crimes are committed by men, not by abstract entities'').[29] It captures only a fraction of human rights and humanitarian violations. It has become increasingly hostile to the idea of enforcing accountability through coercive action. It serves as a disincentive to intervention through growing criminalization of unlawful uses of force (e.g., the crime of aggression).[30]

[26] For instance, the Hague Regulations, Geneva Conventions and Additional Protocols establish obligations, responsibility and legal accountability for actions and omissions, and non-interventionist aspects of prevention.

[27] On the duty of care, see e.g., L. Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice' (2008) 34 *Review of International Studies* 445–458, 445. On solidarity, see ILC, Second report on the protection of persons in the event of disasters, A/CN.4/615, 7 May 2009, para. 54, (''Solidarity as an international legal principle, and distinct from charity, gives rise to a system of cooperation in furtherance of the notion that justice and the common good are best served by policies that benefit all nations'').

[28] See ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia) (Merits), 26 February 2007, para. 430.

[29] International Military Tribunal, *France et al. v. Goering t al*., (1946) 22 *IMT* 411, 466.

[30] On aggression, see L. May, *Aggression and Crimes Against Peace* (Cambridge: Cambridge University Press, 2008); K. Sellars, 'Crimes against Peace' and International Law (Cambridge: Cambridge University Press, 2013); C. McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge: Cambridge University Press, 2013); K. Ambos, 'The Crime of Aggression after Kampala' (2010) 53 *German Yearbook of International Law* 463–509; C. Kreß and L. von Holtzendorff, 'The Kampala Compromise on the Crime of Aggression' (2010) 8 *Journal of International Criminal Justice* 1179.

Moreover, it tends to stress the autonomy of justice responses from other response schemes, i.e. through its emphasis on judicial and prosecutorial independence. These differences become ever more aware, as R2P and international criminal justice are coming of age.

2.2 *An Arranged Marriage*

The idea to merge international criminal justice and R2P was not inherent in the concept. It was arranged. It emerged in the context of the negotiating history of the concept.

The first instrument, i.e. the Report of the Commission on State Sovereignty and Intervention (ICISS Report) sought to identify guidelines for intervention. It contained only marginal references to international criminal justice. It defended a broad conception of R2P. It contained a broad understanding of "just causes" for intervention, focused on "conscience-shocking situation[s]".[31] The Commission placed the emphasis on "protection needs". It linked human protection in situations of civil wars, insurgencies, state repression and state collapse. It identified "two broad sets of circumstances", where R2P comes into play, namely:

> large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
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> large scale "ethnic cleansing," actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.[32]

The Commission drew no distinction between circumstances caused by State action or action by non-state actors.[33] It specified that R2P could be triggered by natural disasters and non-man made causes, such as

> overwhelming natural or environmental catastrophes, where the state concerned is either unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or threatened.[34]

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[31] ICISS Report, para. 4.20.

[32] ICISS Report, para. 419.

[33] It argued that "when it comes to the threshold "just cause" issue of determining whether the circumstances are grave enough to justify intervention, it makes no basic moral difference whether it is state or non-state actors who are putting people at risk". ICISS Report, para. 4.22.

[34] ICISS Report, para. 4.20.

It took into account the nexus of protection to socio-economic rights, such as access to food, employment and environmental security.[35]

The Commission grounded this understanding in three different considerations:

(i) The limits to the principle of 'non-intervention' under the UN Charter[36];
(ii) ''standards of conduct for states in the protection and advancement of international human rights''[37]; and
(iii) the idea of ''universal justice'' (or ''justice without borders''), i.e. the ''transition from a culture of sovereign impunity to a culture of national and international accountability''.[38]

The scope of application of R2P was limited in the process of UN negotiations. The Report of the High Level Panel on Threats, Challenges and Change connected the concept to UN response schemes and existing practice. It excluded natural disasters focused on ''man –made catastrophes'',[39] in line with the ''human security'' focus of the Security Council in situations, such as ''Somalia, Bosnia and Herzegovina, Rwanda, Kosovo and … Darfur, Sudan''.[40] It placed the emphasis on ''deliberate action'' and what it termed ''avoidable catastrophe''. It recognized the

> responsibility to protect'' of *every* State when it comes to people suffering from avoidable catastrophe – mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease.[41]

It focused the trigger of R2P on human atrocities, namely:

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[35] *Ibid.,* para. 2.22 (''One of the virtues of expressing the key issue … as ''the responsibility to protect'' is that it focuses attention where it should be most concentrated, on the human needs of those seeking protection or assistance. The emphasis in the security debate shifts, with this focus, from territorial security, and security through armaments, to security through human development with access to food and employment, and to environmental security.'')

[36] *Ibid.,* paras. 2.7–2.10.

[37] *Ibid.,* paras. 2.16 and 2.17.

[38] *Ibid.,* paras. 2.18–2.20.

[39] UN High-Level Panel on Threats, Challenges and Change: 'A more Secure World: Our Shared Responsibility', Un. Doc. A/59/565 (2004), para. 199.

[40] *Ibid.,* para. 201.

[41] *Ibid.*

genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.[42]

The move towards identifiable violations was tied to exceptions to the principle of non-intervention in UN practice. The Panel noted:

The principle of non-intervention in internal affairs cannot be used to protect genocidal acts or other atrocities, such as large-scale violations of international humanitarian law or large-scale ethnic cleansing, which can properly be considered a threat to international security and as such provoke action by the Security Council.[43]

This language was further modified in the World Summit Outcome Document. It tied the trigger of R2P expressly to accepted labels of ''crimes''. Paragraph 138 states that ''each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity''.[44] This framing placed the focus on protection of civilians from specific crimes. Response to natural disasters was discussed outside the ambit of R2P.

The Secretary-General defended the move towards a ''justice-oriented'' trigger as follows:

To try to extend it to cover other calamities, such as HIV/AIDS, climate change or the response to natural disasters, would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility.[45]

This approach was later partially confirmed in the ILC Draft Articles on Protection of Persons in the Event of Natural Disasters which build on elements of R2P but omit an express reference to the concept.[46]

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[42] *Ibid.,* para. 203.

[43] *Ibid.,* para. 200.

[44] See para. 138 of the World Summit Outcome Document.

[45] Report of the Secretary-General, 'Implementing the responsibility to protect', UN. Doc A/63/677, 12 January 2009, para. 10 (b).

[46] See ILC Report on the Work of its 61st Session, UN. Doc, A/64/10, para. 164 (''Agreement was expressed with the Special Rapporteur's conclusions on the non-applicability of the concept of responsibility to protect, although some expressed the view that any such decision by the Commission should not prejudice the possible relevance of the concept in the future''). See also ILC, Second report on the protection of persons in the event of disasters, A/CN.4/615, 7 May 2009, para. 8 (''a rights-based approach to the topic was supported by various delegations, while some expressed doubts as to whether such was the correct path to be followed in this case.

The choice may be explained by a number of pragmatic considerations.[47] The ''atrocity-crime'' based trigger has appeal since it is neither ''too high'' nor to ''too low''.[48] It reflects a strategic choice to keep the scope of R2P narrow at the outset, in particular due to its nexus to exemptions from non-intervention.[49] It provides a ''tangible threshold'' for action.[50] It ties response schemes to widespread violence and civil unrest, in particular ''the deliberate targeting of specific groups, communities or populations [...] and sometimes cycles of reaction and counter-reaction between communities''.[51] The requirement of ''manifest failure'' in paragraph 139 raises the threshold for ''outside invention''. Some argue that this framing is deemed to exclude small-scale war crimes, or even ''slow-motion'' crimes against humanity, such as institutionalized apartheid, disappearances and sexual violence, which may occur without widespread conflict and internal disruption.[52] The existing formulation further

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Footnote 46 continued
Similarly, while the relevance of a ''responsibility to protect'' still remained unclear for several delegations, some delegations considered that the Commission should not find itself prevented from considering that notion, should the logic of its undertaking propel it in that direction''). For a discussion, see T. Allan and T. O'Donnell, 'A Call to Alms?: Natural Disasters, R2P, Duties of Cooperation and Uncharted Consequences' (2012) 17 *Journal of Conflict & Security Law* 337. See also generally G. Evans, 'The Responsibility to Protect in Environmental Emergencies' (2009) 103 *Proceedings of the 103rd Annual Meeting of the American Society ofInternational Law* 27–32; A. McLachlan-Bent and J. Langmore, 'A Crime against Humanity? Implications and Prospects of the Responsibility to Protect in the Wake of Cyclone Nargis' (2011) 3 *Global Responsibility to Protect* 37.

[47] For a discussion, see D. Scheffer, 'Atrocity Crimes: Framing the Responsibility to Protect' (2007–2008) 40 *Case Western Reserve Journal of International Law* 111.

[48] See also Mégret (n 9 above), at 31.

[49] Report of the Secretary-General, 'Implementing the responsibility to protect' (n 45 above), para. 10 (c) (''While the scope should be kept narrow, the response ought to be deep'').

[50] Note that crimes trigger leaves uncertainties. There are, for instance, significant disputes over the reach of crimes against humanity. See e.g., C. Kress, 'On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC *Kenya* Decision' (2010) 23 *Leiden Journal of International Law* 855; T. Rodenhauser, 'Beyond State Crimes: Non-State Entities and Crimes Against Humanity' (2014) 27 *Leiden Journal of International Law* 913.

[51] See Report of the Secretary-General, 'Responsibility to protect: State responsibility and prevention', UN. Doc. A/67/929–S/2013/399, 9 July 2013, para 12.

[52] Scheffer (n 24 above), 86–92.

enhances the normative force of R2P. It grounds it in precedent, such as the "right" of the African Union "to intervene … in respect to grave circumstances, namely: war crimes, genocide, and crimes against humanity".[53] This is deemed to mitigate (neo-)imperial critiques of R2P.

These pragmatic reasons are complemented by other grounds that go beyond rational choice. The 'crime-based' trigger has emotional attraction since it limits moral opposition to R2P. The label of 'atrocity crimes' (e.g., genocide, crimes against humanity, ethnic cleansing) is associated with a social stigma that makes it harder to oppose its invocation. It embraces conduct that impossible to justify in situations of conflict. As Secretary-General Ban Ki Moon put it in 2009,

> …no community, society, or culture publicly and officially condones genocide, war crimes, ethnic cleansing or crimes against humanity as acceptable behaviour.[54]

Moreover, the crime-label has attraction since it provides a legal backing against political and moral challenges to R2P. Linking the concept to the duty to investigate and prosecute under international law tempers the space of the 'political' in human security responses.[55] It frames R2P action as a matter of necessity, rather than an act of choice.

2.3 *The "Honeymoon" Period*

The relationship between R2P and international criminal justice was clarified in the aftermath of the 2005 World Summit Outcome Document. The 2009 Report of the Secretary-General on 'Implementing the Responsibility to Protect' set out what one might call the honeymoon period in the newly formed relationship.

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[53] Art 4 of Article 4 of the Constitutive Act of the African Union provides for: "(h) the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity". For a study, see D. Kuwali, *The Responsibility to Protect: Implementation of Article 4(h) Intervention* (Leiden: Brill, 2011).

[54] Report of the Secretary-General, 'Implementing the responsibility to protect', (n 43 above), para. 20.

[55] On the space of the 'political' in international criminnal justice, see W. Werner and S. Nouwen, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2010) 21 *EJIL* 941.

The report arranged the current pillar structure of R2P and shifted the emphasis from coercive intervention to prevention and other softer institutional responses to crisis within the UN system. It claimed that R2P ''seeks to strengthen sovereignty, not weaken it'' and ''help States to succeed, not just to react when they fail''.[56]

The report grounded essential elements of R2P in law, rather than politics. It noted that ''provisions of paragraphs 138 and 139 of the Summit Outcome are firmly anchored in well-established principles of international law''.[57] It stressed the mutually reinforcing nature of R2P and international criminal justice. It argued that R2P provides conditions that facilitate a better enforcement of international criminal justice. It claimed that causes of mass atrocities can be mitigated through international institutional responses, such as ''preventive diplomacy'' or ''capacity-building''.

This institutional logic and its confidence in the conflict resolution potential of UN mechanisms is reflected in the statement that:

> [g]enocide and other crimes relating to the responsibility to protect do not just happen. They are, more often than not, the result of a deliberate and calculated political choice, and of the decisions and actions of political leaders who are all too ready to take advantage of existing social divisions and institutional failures …They are neither inevitable nor unavoidable.[58]

The report applied this functionalist approach to international criminal justice. It openly characterized international justice as a tool for implementing the goals of R2P. It branded the Rome Statute expressly as ''one of the key instruments relating to the responsibility to protect''.[59] It recognized the preventive function of international criminal courts and tribunals. It notes:

> By seeking to end impunity, the International Criminal Court and the United Nations-assisted tribunals have added an essential tool for implementing the responsibility to protect, one that is already reinforcing efforts at dissuasion and deterrence.[60]

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[56] Report of the Secretary-General, 'Implementing the responsibility to protect', (n 45 above), para 10.

[57] *Ibid.,* para. 3.

[58] *Ibid.,* para. 21.

[59] *Ibid.,* para. 19.

[60] *Ibid.,* para. 18.

It then identified different means and strategies through international criminal justice may strengthen R2P. It makes reference to (i) the principle of complementarity, in particular the role of ''national judicial processes'' as ''the first line of defence against impunity'',[61] (ii) the need for national implementing legislation, in order to ensure ''that the four specified crimes and violations and their incitement are criminalized under domestic law and practice''[62] and (iii) the role of preventive diplomacy, i.e. calls to hold ''political and community leaders … accountable for violations of international law'' at ''their instigation''.[63]

The report transformed R2P from a humanitarian doctrine into a conflict resolution technique. It linked the operationalization of R2P expressly to strategies of ''capacity-building''. It noted that:

> Responsible sovereignty … entails the building of institutions, capacities and practices for the constructive management of the tensions so often associated with the uneven growth or rapidly changing circumstances that appear to benefit some groups more than others.[64]

This framing resonated well with existing weaknesses of international criminal justice. International criminal justice has suffered from selectivity problems and enforcement gaps since it its inception. It has been in search of an overarching theory that bolsters its moral authority and increases pressure for compliance of States. R2P offered a new prospect to mitigate those dilemmas.

The managerial approach to justice coincided with the increasing focus on deferral of international authority and strengthening of domestic jurisdiction in the context of the completion strategy of the *ad hoc* tribunals.[65] The protective function of R2P provided authority for an increased focus on outreach, capacity-building and restorative approaches to victims in the activities of the tribunals.[66] It allowed

[61] *Ibid.,* para. 19.

[62] *Ibid.,* para. 17.

[63] *Ibid.,* para. 55.

[64] *Ibid.,* para. 14.

[65] See D. Raab, 'Evaluating the ICTY and its Completion Strategy: Efforts to Achieve Accountability for War Crimes and their Tribunals' (2005) 3 *JICJ* 82; K. J. Heller, 'Completion' in L. Reydams, J. Wouter and C. Ryngaert (eds.), *International Prosecutors* (Oxford: Oxford University Press, 2012) 886.

[66] In the ICC context, this is reflected in the idea of the Trust Fund for Victims. On resources, see M. Wierda and A. Triolo, 'Resources', in Reydams, Wouter and Ryngaert (eds.), (n 63 above), 113. For a discussion of outreach, see J. N. Clark,

the tribunals to claim vis-à-vis the UN that these areas form part of the inherent mandate of international criminal jurisdictions.[67]

The conception of R2P presented in the report also strengthened strategies developed in the first practice of the ICC. Due to its strong dependence on States in relation to jurisdiction, cooperation and evidence, the Court has been described as a ''giant without legs'' since its inception.[68] This challenge has prompted a need for institutional creativity and a search for new approaches to make the ICC relevant in international relations. It resulted in a number of innovations: (i) the development of new alert functions, i.e. the use of preliminary examination as a tool to flag violations and mobilize international action,[69] (ii) the increased emphasis on national responsibility[70] and (iii) the design of strategies to act ''in partnership'' with States and encourage domestic

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Footnote 66 continued
åInternational War Crimes Tribunals and the Challenge of Outreach' (2009) *International Criminal Law Review* 99; R. Hodžić, 'Living the Legacy of Mass Atrocities: Victims' Perspectives on War Crimes Trials' (2010) 8 *JICJ* 113. For a study of capacity building, see E. Baylis, 'Reassessing the Role of International Criminal Law: Rebuilding National Courts Through Transnational Networks' (2009) 50 *Boston College Law Review* 1; D. Tolbert and A. Kontić, 'The International Criminal Tribunal for the former Yugoslavia: Transitional Justice, the Transfer of Cases and Lessons for the ICC', in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Leiden: Brill, 2009) 135–162; M. Bergsmo, O. Bekou & A. Jones, 'Complementarity After Kampala: Capacity Building and the ICC's Legal Tools' (2010) 2 *Goettingen Journal of International Law* 791.

[67] For a skeptical take, see R. Zacklin, 'The Failings of Ad Hoc International Tribunals' (2994) 2 *JICJ* 541.

[68] On the origin of the image, see A. Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 *EJIL* 13.

[69] OTP, Policy Paper on Preliminary Examinations, November 2013, at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf. For analysis, see P. Seils, 'Making Complementarity Work: Maximizing the Limited Role of the Prosecutor', in Stahn and El Zeidy (eds.), (n 18 above) 989–1013.

[70] Para. 1 of the Kampala Review Conference Resolution on complementarity '[r]ecognizes the primary responsibility of States to investigate and prosecute the most serious crimes of international concern'. See Resolution RC/Res.1, 8 June 2010, para. 1.

investigation and prosecution (''positive complementarity'', ''reverse cooperation''[71]). These strategies were set out in the Report on Prosecutorial Strategy (2009–2012) which stated that ''much of the work done to achieve the goals of the Statute may take place in national judiciary around the world'', while cautioning that ''the number of cases that reach the Court is not a positive measure of effectiveness''.[72]

R2P provided to some extent the missing piece in the construction of complementarity. The Rome Statute operates on the implicit assumption that states have a duty to investigate and prosecute.[73] But it failed to spell out the origin of this obligation and a duty to implement core crimes.[74] The articulation of R2P filled this authority gap, through its principled recognition of the duty to prevent and punish and the role of domestic jurisdiction as ''first port of entry'' (para. 138). The response options under R2P (para. 139) provided additional leverage to use complementarity as a ''catalyst for compliance'' in ICC strategy.[75] The 'assistance' pillar of R2P provided additional authority to strengthen the importance of domestication of ICC norms and procedures[76] and to defend a nexus between the ICC and development strategies.[77]

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[71] See OTP, Informal expert paper, 'The principle of complementarity in practice' (2003), paras. 7–15, at http://www.iclklamberg.com/Caselaw/OTP/Informal%20Expert%20paper%20The%20principle%20of%20complementarity%20in%20practice.pdf. On 'reverse cooperation', see F. Gioia, 'Complementarity and ''Reverse Cooperation''', in Stahn and El Zeidy (eds.), (n 19 above) 807–828.

[72] See OTP, Prosecutorial Strategy 2009–2012, 1 February 2010, para. 79, paras. 16–17, at http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf.

[73] See 6th preambular paragraph of the ICC Statute, ''[r]ecalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes''.

[74] An express duty exists only in relation to cooperation. See Art. 88 of the ICC Statute (''States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part'').

[75] See generally J. K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford: Oxford University Press, 2008) Chapter 7.

[76] See Report of the Secretary-General, Implementing the Responsibility to Protect, (n 45 above), para. 44 (''What is most needed, from the perspective of the responsibility to protect, are assistance programmes that are carefully targeted to build specific capacities within societies that would make them less likely to travel the path to crimes relating to the responsibility to protect'').

[77] For a critical account, see S. Kendall, 'Donors' Justice: Recasting International Criminal Accountability' (2011) 24 *LJIL* 585. On development and transitional justice, see R. Duthie, 'Towards a Development-sensitive Approach to Transitional

III A MARRIAGE WITHOUT CONTRACT

The problem of the conception of R2P in the 2009 report is that it is both over-inclusive and under-inclusive. R2P was formulated loose and flexible enough to facilitate that merger. It provided a call for action and a duty to react. It mandates, as Jennifer Welsh put it, that mass atrocity situations be identified, and that action be taken, but it "does not specify precisely what kind of action is appropriate".[78]

This construction may offer some benefits in relation to the discourse on intervention, since it protects the integrity of the concept in cases where it is abusively invoked to justify a specific response scheme to a crisis (e.g., military intervention). But it also comes with downsides. It packaged a wide range of responses under a common umbrella, without paying tribute to their individual functions and distinctions.[79]

The report embraced a broader trend within the UN system to conceptualize human rights bodies, humanitarian action and institutions of criminal justice as part of a common response strategy to atrocity crimes. It presents diverse actors, such as fact-finding missions, human rights bodies, peace operations and international criminal courts and tribunals as members of a "happy" community of institutions that act in concert for the common goal of preventing and ending mass atrocities. It assumed that they serve as conflict resolution mechanisms.

This approach has triggered different types of criticisms. In the human rights community, R2P has been criticized for its selectivity and under-inclusion. The crimes trigger strengthens the alert function of human rights mechanisms. But it poses constraints from a conflict

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Footnote 77 continued
Justice' (2008) 2 *IJTJ* 294; P. de Greiff and R. Duthie (eds.), *Transitional Justice and Development: Making the Connection* (New York: Social Science Research Council, June 2009).

[78] See J. Welsh, 'Where R2P Goes From Here', 21 August 2013, http://opencanada.org/features/the-think-tank/interviews/where-r2p-goes-from-here/.

[79] For a similar claim in relation to complementarity in the ICC context, see F. Mégret, 'Too Much of a Good Thing? Implementation and the Uses of Complementarity', in Stahn and El Zeidy (eds.), (n 19 above), 361, at 364.

resolution perspective. It makes R2P ''thin''[80], rather than ''narrow'' and ''deep''.[81] The crime trigger associates protection needs mostly with political violence. It privileges specific human rights protections, i.e. the right to life and bodily integrity, and civil and political rights, more broadly, to the detriment of socio-economic rights (e.g., welfare, health).[82] It makes it harder to invoke the loss of sovereignty as a shield in cases of human rights abuses that do not amount to atrocity crimes. It is reductionist since it reduces the complexity of social realities into the rudimentary language of criminal law. Moreover, it poses some ideological challenges that hamper enforcement. The reference to crimes and the link to State failure attach particular stigmas to the application of R2P that impede its acceptance by defiant States and its use as a non-coercive tool. [83]

In the international criminal justice community, R2P is criticized for its over-inclusiveness as to the functions of justice. The crime-based definition of R2P has reinforced the trend of human rights bodies to make findings on international criminal violations. In particular, fact-findings mechanisms have increasingly focused on ''atrocity crimes'' over the past decade.[84] This has led to divergent approaches towards the application of substantive international criminal law[85] and concerns about due process standards (e.g., in

[80] See D. Chandler 'R2P or Not R2P? More Statebuilding, Less Responsibility' (2010) 2 *Global Responsibility to Protect* 161, 165 (''This liberal institutional approach understands mass atrocities outside of a concern with economic and social relations, focusing merely on the institutional structures which are held to shape the behaviour of individuals'').

[81] See Report of the Secretary-General, Implementing the Responsibility to Protect, (n 45 above), para. 10 (c).

[82] See generally E. Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* (Cambridge: Cambridge University Press, 2015).

[83] See Chandler, (n 80 above), 164 (arguing that R2P presents ''weak institutional capacity of some sovereign states'' as a problem).

[84] See L. van den Herik, 'An Inquiry into the Role of Commissions of Inquiry in International Law: Navigating the Tensions between Fact-Finding and Application of International Law' (2014) 13 *Chinese Journal of International Law* 507.

[85] See e.g., L. van den Herik and C. Harwood, 'Sharing the Law: The Appeal of International Criminal Law for International Commissions of Inquiry', Grotius Centre Working Paper No. 2014/016-ICL, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2387554; T. Rodenhauser, 'Progressive Development of International Human Rights Law: The Reports of the Independent International Commission of Inquiry on the Syrian Arab Republic', EJIL Talk, http://www.ejiltalk.org/progressive-development-of-international-human-rights-law-the-reports-of-the-independent-international-commission-of-inquiry-on-the-syrian-arab-republic/.

relation to naming of individual suspects) and investigative methodologies (e.g., protection of witnesses and victims) of human rights fact-finders.[86]

More fundamentally, the 2009 report has embraced a ''fit-all'' conception of justice that is increasingly under challenge. It treated international criminal justice as a tool of conflict resolution,[87] without engaging with the roles and limits of justice institutions.[88] The report failed to recognize that goals of justice do not necessarily coincide with the goals of with humanitarian action. It assumed that international criminal justice institutions have a preventive function, without engaging with the conditions under what such effects may occur.[89] It took it for granted that a greater managerial role of international courts and tribunals is conducive to the goals of protecting R2P. It failed to examine whether such an approach is conducive to the goals of justice. R2P and international criminal justice are not ''always mutually reinforcing''.[90] The report paid insufficient attention to the fundamental question whether and to what extent a greater operational role of international courts and tribunals under R2P may be reconciled with prerequisites of judicial and

[86] D. Saxon, 'Purpose and Legitimacy in International Fact-Finding Bodies', in M. Bergsmo (ed.), Quality Contril in Fact-Finding (Torkel Opsahl Academic EPublisher, 2013) 211, 222–224; T. Boutruche, 'Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice' (2011) 16 *Journal of Conflict and SecurityLaw* 108.

[87] For the recognition of a pragmatic link, see K. A. Rodman, 'Justice as a Dialogue Between Law and Politics' (2014) 12 *JICJ* 437, 469 (''pragmatism requires the Prosecutor to construe her discretion as part of a dialogue, both with stakeholders likely to be affected by criminal proceedings, and with the international actors involved in conflict resolution, peace-building, and humanitarian activities'').

[88] For a careful appraisal of the functions of international criminal justice, see R. Cryer, H. Friman, D. Robinsin and E. Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 3rd ed. (Cambridge: Cambridge University Press, 2014) 28–42; M. Damaska, 'What Is the Point of International Criminal Justice' (2008) 83 *Chicago-Kent Law Review* 329; S. Dana, 'The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations? (2014) 3 *Penn State Journal of Law and International Affairs* 30.

[89] See generally P. Akhavan, 'Can International Criminal Justice Prevent Future Atrocities? (2001) 95 *LJIL* 7; J. Ku and J. Nzelibe, 'Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?' (2006) 84 *Washington University Law Review* 777; L. Vinjamuri, 'Deterrence, Democracy, and the Pursuit of International Justice' (2010) 24 *Ethics & International Affairs* 191.

[90] See also Roland Paris, 'R2P v. ICC', 24 June 2011, at http://opencanada.org/features/r2p-v-icc/.

prosecutorial independence, as well as standards of fairness and impartiality of judicial behavior. No attempt was made to improve interaction between existing institutions, i.e. to work towards a better connection between international criminal justice institutions and other response mechanisms. The Secretary General urged the Permanent Members to ''refrain from employing or threatening to employ the veto in situations of manifest failure to meet obligations relating to the responsibility to protect''.[91] But the crucial working relationship between the Security Council and the ICC remained largely unaddressed.

This may explain why there is gap between narrative and reality. R2P has been invoked on numerous occasions in the context of human rights fact-finding. Several fact-finding missions have concluded that the concerned state failed to exercise its responsibility to protect its population (Syria, Kenya)[92] and that the international community has a duty to act (Syria, North Korea).[93] Commissions of Inquiry have recommended international criminal accountability responses, such as referral by the Security Council to the ICC (Darfur, Guinea, Syria, North Korea),[94] exercise of universal jurisdiction (High-level

[91] Report of the Secretary-General, Implementing the Responsibility to Protect, (n 45 above), para. 61.

[92] For instance, the International Commission of Inquiry on Syria ('Syria Commission') held that the Syrian Government had ''manifestly failed in its responsibility to protect the population''. See Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc. A/HRC/19/69, 22 February 2012, para. 126. An OHCHR fact-finding mission in Kenya in 2008 reported that the State had failed to meet its responsibility to protect its population. See Report from OHCHR Fact-finding Mission to Kenya, 6–28 February 2008, at 12.

[93] For instance, the 2014 report of the North Korea Commission reported that ''[t]he international community must accept its responsibility to protect the people of the [North Korea] from crimes against humanity, because the Government […] has manifestly failed to do so.'' Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, UN Doc. A/HRC/25/63, 7 February 2014, para. 86. In 2013, the Syria Commission underlined the responsibility of the international community ''in the search for peace and the commitment to international human rights and humanitarian law.'' Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc. A/HRC/22/59, 5 February 2013, para. 171.

[94] Report of the International Commission of Inquiry on Darfur, 25 January 2005, paras. 571–589 and 647, at http://www.unrol.org/files/com_inq_darfur.pdf; Report of the International Commission of Inquiry Mandated to Establish the Facts and Circumstances of the Events of 28 September 2009 in Guinea, UN Doc. S/2009/693, 18 December 2009, para. 266; Syria Commission, (n 92 above), para. 180(b); North Korea Commission, (n 92 above), para. 94(a).

Mission on Darfur, Goldstone Commission)[95] or the establishment of *ad hoc* international tribunals.

International justice institutions have kept a critical distance in official discourse. They remained reluctant to apply R2P as a legal concept. The International Court of Justice had the opportunity to refer to R2P in the *Genocide* cases,[96] but refrained from invoking it in a notable fashion in jurisprudence. A similar picture prevails in the ICC context. The concept has been applied incrementally. It was mentioned by the ICC Prosecutor[97] and delegates (e.g., Sweden, Japan) in statements.[98] But it has thus far not played a key role in judicial decisions or motions, although it could have been invoked in contexts such as Kenya, Libya or Darfur.

The lack of reference to R2P may be partly explained by doubts about the normative quality of R2P.[99] But the causes of problems lie deeper.

IV DISCOURSE AND RELATIONSHIP PROBLEMS

The crisis in the relationship between R2P and international criminal justice is grounded in discourse problems and false premises of interaction. The normative appeal of R2P as a concept has been

[95] Report of the High-Level Mission on the Situation of Human Rights in Darfur, UN Doc. A/HRC/4/80, 9 March 2007, para. 77(i); Report of the UN Fact-Finding Mission on the Gaza Conflict, UN Doc. A/HRC/12/48, 25 September 2009, para. 1975.

[96] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports 2007 43; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia *v*. Serbia), 3 February 2015, at http://www.icj-cij.org/docket/files/118/18422.pdf.

[97] See Luis Moreno Ocampo, Keynote Address, 17 November 2006, Chicago, Illinois, at http://r2pcoalition.org/content/view/61/86/, arguing that there is "common ground" between R2P and the ICC, "because the scheme envisioned by the Responsibility to Protect where each individual State has the primary responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity, including the prevention of such crimes, and the idea that the international community will only step in when a State is failing to do is very much the scheme retained in Rome for the International Criminal Court, the same concept, including the gravity threshold retained for the Responsibility to Protect is also close to our own legal standards under the Rome Statute".

[98] See M. Contarino and M. Negron-Gonzales, 'The International Criminal Court', in Zyberi, (n 1 above), 411, 413.

[99] In UN documents, R2P is understood as a 'concept', 'principle,' or 'standard'.

overshadowed by its use as a tool of intervention. Instead of benefiting from the invocation of sovereignty as responsibility, international criminal justice has been affected by some of the very same critiques that have been voiced against R2P.

There are three fundamental factors that have compromised the interplay between international criminal justice and R2P: (i) an overambitious link between consequentialist approaches to justice and human security agendas, (ii) declining faith in the nexus of international criminal justice and R2P to collective security, and (iii) problems related to the use of punitive rationales as a justification for intervention.

4.1 *Misalignment Between Justice and Human Security Agendas*

Some of the common ground that has traditionally been assumed in relation to the interplay between R2P and international criminal justice has faded. The alliance between the two concepts was based on the assumption that it is useful to combine justice and human security agendas. The branding of R2P as conflict resolution mechanism and the reference to Courts as ''tools'' in this box have provided an incentive to portray international criminal court and tribunals as human security actors.

This conception is tempting for international criminal justice. It helps to put accountability dilemmas on the radar on the short-run and may secure some quick-wins. But it has visible downsides from a systemic and long-term perspective. It has transformed courts from judicial entities into managerial actors and exposed to them to some the same dilemmas that ''outside'' actors face when proclaiming to protect ''the rights of others''.

These dilemmas have become particularly apparent in the context of the first practice of the ICC. Much of the rhetoric of early ICC action has revolved around security agendas and consequentialist considerations. Prosecutorial strategy has overemphasized the role of the ICC in crisis management. Some of the strategies were primarily guided at effecting societal and political transformation through the vehicle of justice. This has reversed cause and effect. Human security may be well a consequence or side-effect of justice intervention. But choices related to the investigation and prosecution of crimes should not be primarily guided by human security concerns.

The first practice of the ICC has turned this logic around. Speculation about calculated political and societal outcomes have been at the forefront of strategies and decision-making practice. In

the context of Uganda,[100] ICC action was visibly guided at improving security conditions, caused through the moves of the LRA.[101] The Prosecutor portrayed the role of the ICC as security agent and ''savior'' of the interests of Ugandan society. Some of the first draft press releases of the Office of the Prosecutor were directed to the ''people of Uganda''. Arrests warrants were geared at insulating the LRA leadership, in order to cause internal division and dismantle LRA structures. But this strategy failed to produce the desired consequences. When arrest and prosecution strategies did not bear fruit, provision about information about declining crime rates in Uganda became a focal point of submissions. After the failure of Juba peace talks, the situation lay virtually dormant until the capture of Dominic Onwgen.[102]

In Kenya, speculation about election politics became a prime objective of justice intervention.[103] The engagement of the ICC was

[100] See generally T. Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London: Zed Books, 2006); M. Wierda and M. Otim, 'Courts, Conflict and Complementarity in Uganda, in Stahn and El Zeidy, (n 19 above) 1155–1178; P. Clark, 'Chasing Cases: The ICC and the Politics of State Referral in the Democratic Republic of Congo and Uganda', in Stahn and El Zeidy (eds.), (n 19 above) 1180–1202. For a discussion, see also Nouwen, (n 9 above), at 56–59.

[101] For statistics on 'quantitative analysis of the deterrence impact', see J. Mendez, 'The Importance of Justice in Securing Peace', 18 May 2010, at http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Stocktaking/The%20Importance%20of%20Justice%20in%20Securing%20Peace.pdf.

[102] Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following the surrender and transfer of top LRA Commander Dominic Ongwen, 21 January 2015, at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-21-01-2015.aspx (arguing that ''Dominic Ongwen's transfer brings us one step closer to ending the LRA's reign of terror in the African Great Lakes region''). For a discussion, see A. Whiting, 'Is a Plea Agreement for Dominic Ongwen a Good Idea?', 10 February 2015, at http://postconflictjustice.com/is-a-plea-agreement-for-dominic-ongwen-a-good-idea/.

[103] See generally S. Brown, 'Lessons Learned and Forgotten: The International Community and Electoral Conflict Management in Kenya', in D. Gillies (ed.) *Elections in Dangerous Places: Democracyand the Paradoxes of Peacebuilding* (Montreal: McGill-Queen's University, 2011) 127–143; C. Alai and N. Mue, 'Complementarity and the Impact of the Rome Statute and the International Criminal Court in Kenya', in Stahn and El Zeidy (eds.), (n 19 above) 1222–1233; S. Höhn, 'New Start or False Start? The ICC and Electoral Violence in Kenya', (2014) 45 *Development and Change* 565–588.

partly driven by the goal to send a message that election violence is impermissible on the African continent, and elsewhere in the world. Charges were partly geared at ''rebuild[ing] Kenya on new foundations''[104] and ''provid[ing] an example on how to do justice, protect victims and overcome massive conflicts''.[105] As Luis Moreno-Ocampo admitted later openly, ICC action was guided by the ambition to transform ''transform Kenya into Sweden''.[106] ICC strategies and cases were chosen on that premise, making a link between the 2007 electoral violence and prevention of violence in subsequent elections.[107] The reliance on calculated effects was then used as a technique to validate ICC intervention.[108] The peaceful holding of the 2013 elections was branded as success of ICC action. This strategy triggered vast public mobilization (''Don't be vague, go to the The Hague'). But it masked problems relating to evidence gathering and actual delivery of justice in the Courtroom. Moreover, the calculus inherent in the ICC claim remained fragile. It sidelined the fact that political violence in Kenya had origins in longer term disputes over land resources and access to politics which cannot be solved through criminal charges.[109]

A similar rationale was used in the context of Ivory Coast. In November 2004, Juan Mendez, former UN Advisor on the Prevention of Genocide, made a statement that public incitement to violence would come within the ambit of ICC jurisdiction, which was branded as ''anecdotal evidence that the threat of prosecution in some cases

[104] See OTP Statement, 'Press Conference by the Prosecutor of the International Criminal Court, Luis Moreno Ocampo, Thursday November 26, 2009, Nairobi and The Hague', at 1, at http://www.icc-cpi.int/NR/rdonlyres/A2B59665-397C-4C47-9CFA-18958E6AB28C/281313/LMOINTROstatement26112009_2_2.pdf.

[105] *Ibid.,* at 2.

[106] See Interview, 22 January 2014, at http://www.rnw.nl/africa/article/ocampo-exclusive.

[107] See OTP Statement, (n 104 above), at 3 (''It has been two years since the post-election violence in Kenya. In two years, another election is planned. The world is watching Kenya and this Court. We cannot fail the women, men and children of Kenya'').

[108] See International Crisis Group, 'Kenya: Impact of the ICC Proceedings', Policy Brief, Africa Briefing N°84 Nairobi/Brussels, 9 January 2012, at http://www.crisisgroup.org/~/media/Files/africa/horn-of-africa/kenya/B084%20Kenya%20——%20Impact%20of%20the%20ICC%20Proceedings.pdf.

[109] See Höhn, (n 103 above), at 572.

can stay the hand of the perpetrators of mass atrocities".[110] In December 2010, the ICC Prosecutor invoked the 2003 declaration of acceptance of jurisdiction in December 2010 in order to curtail violence in presidential elections. Deputy Prosecutor Fatou Bensouda issued a statement that illustrates the human security oriented rationale of ICC scrutiny. It reads like a UN press release: "I urge supporters of the candidates and security forces to refrain from violence".[111] This strategy is appealing from a rhetorical point of view. But it has something ambivalent. It reduces the complexity of social reality by suggesting that electoral violence can be reduced to fights of individuals over political interests.[112]

Speculation about political outcomes further influenced the timing of ICC decision-making processes. In the Columbian situation, the Prosecutor deferred its decision to act under Article 15, in order to await the outcome of peace negotiations and the operation of the Peace and Justice Law.[113] In the Palestine context, the Office tied its decision on the (non-)exercise of jurisdiction following the 2009 declaration of acceptance of jurisdiction under Article 12 (3) to UN moves in the General Assembly,[114] which prompted criticism as to

[110] See J. Mendez, 'Justice and Prevention', in Stahn and El Zeidy (eds.), (n 19 above), 33, at 47.

[111] See Statement by the Deputy Prosecutor of the ICC on situation in Cote d'Ivoire, 2 December 2010.

[112] Höhn, (n 103 above), at 582.

[113] For a critique, see Seils, (n 69 above), at 1011 ("That patience, five years after writing to Colombia in March 2005, has not been vindicated in terms of encouraging genuine national proceedings. Nor has it been vindicated in terms of deterring serious crimes").

[114] In the Update on the 'Situation in Palestine, issued on 3 April 2012, i.e. almost three years after the Palestinian declaration, the OTP stated that "competence for determining the term 'State' within the meaning of article 12 rests, in the first instance, with the United Nations Secretary General who, in case of doubt, will defer to the guidance of General Assembly". See OTP, Situation in Palestine, 3 April 2012, at http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf.

externalization of authority and undue delay.[115] In both contexts, this risk-management strategy came at some cost in relation to the perception of the impartiality and effectiveness of justice. In the Libyan context, the ICC acted much more quickly than in other situations. It decided within a couple of days to initiate investigations.[116] This was visibly geared at de-legitimizing the Gaddafi-regime. After the fall of the regime, the Prosecutor took a U-turn. The OTP adopted a hands-off approach, and disengaged from investigations and prosecution, because of faith in the capacity of the Libyan people.[117]

One of the lessons of the first decade of the ICC is that it is risky to rely on calculated political effects to motivate prosecutorial choices. Placing human security concerns at the center of justice-related decision-making processes is likely to result in disappointment and failure. It might ultimately lead to a mission creep of international criminal justice. Viewing international criminal justice as a project to build responsible sovereignty is overambitious. It reverses priorities. International criminal justice may certainly entail the incapacitation of political leaders, and might improve security or societal conditions. But such effects should not be turned into the primary agenda. They inevitably expose international criminal justice to critiques and dilemmas of intervention and imperialism.

[115] For critical assessment, see J. Dugard, 'Palestine and the International Criminal Court Institutional Failure or Bias?' (2013) 11 *JICJ* 563. On 16 January, a preliminary examination was opened, more than two years after the adoption of Resolution 67/19 by the General Assembly which granted Palestine 'non-member observer State' status in the UN on 29 November 2012. See OTP Press Release, 'The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine' , ICC-OTP-20150116-PR1083, 16 January 2015, at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx.

[116] On 26 February 2011, the UN Security Council referred the situation on Libya to the ICC. On 28 February 2011, the Prosecutor opened the preliminary examination. See OTP, 'Statement by the Office of the Prosecutor on situation in Libya', 28 February 2011, at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/statementlybia28022011.aspx.

[117] For an analysis, see C. Stahn, 'Libya, the ICC and Complementarity: A Test for 'shared responsibility' (2012) 10 *JICJ* 325–351.

4.2 *Breakdown of Faith in the Nexus to Collective Security*

A second strand of problems arises in relation to the role of the Security Council. International justice and R2P were created based on faith in the virtues of collective security. There was initial trust that a constructive 'marriage' between justice and R2P could unfold under the umbrella of UN peace maintenance. Security Council action was seen as an ideal type of collective response under R2P[118] and as an opportunity to overcome the limitations of the ICC.[119] But this confidence has waned. Both, international criminal justice and R2P have suffered from the alliance with Security Council practice. The ICC and R2P become instruments of the UN Security Council and to some extent a drop box for problems.[120] This has damaged their relationship.

International criminal justice was developed on the premise that the cause of justice is strengthened by the link to collective security. The Security Council was heralded as guardian of the ''sanctity of international justice'' and humanitarianism. Both ideals have faded.

The first referrals of the Security Council to the ICC were associated with great hopes and expectations, and a certain sense of triumph. There was a willingness to accept a certain sacrifice. But they turned partly into poisoned gifts. The way in which have been handled have left a sense of bitterness and disillusion.

As Louise Arbour, former Chief Prosecutor of the ICTY, has noted in her fundamental critique of internationalism:

> Two referrals by the Security Council to the ICC, in the cases of Darfur and Libya, have done little to enhance the standing and credibility of the ICC, let alone contribute to peace and reconciliation in their respective regions … Security Council referrals expand the reach of accountability to countries that have chosen not to be parties to the Rome Statute that established the ICC. But they do so at a cost that any justice system should find difficult to bear … Security Council referrals … expose

[118] See para. 139 of the World Summit Outcome Document.

[119] In the drafting history of the Statute, only some states (Pakistan, India, United Arab Emirates and Yemen) expressed criticism in relation to the power of the Security Council to refer situations to the ICC. See W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010) 295–296.

[120] For an assessment, see J. Trahan, 'The Relationship between the International Criminal Court and the UN Security Council: Parameters and Best Practices' (2013) 24 *CLF* 417; D. Ruiz Verduzco, 'The UN Security Council and the International Criminal Court', Chatham House International Law Meeting Summary, 16 March 2012, at http://www.pgaction.org/pdf/activity/Chatham-ICC-SC.pdf.

the Court to charges of politicisation, while providing the Court with no compensatory benefits such as additional financial, political or operational support.

[I]n the end, Council referrals may in fact underscore the Court's impotence rather than enhance its alleged deterrent effect, given that in Darfur Security Council backing has achieved so little, while in Libya there is a sense in some quarters that the Court withdrew from a contentious arena leaving the indictees to be tried in a judicial system under severe stress.[121]

Problems exist on several levels. The jurisdictional exemptions in existing Council resolutions,[122] and the shift of the financial burden of referrals on the ICC despite the contrary assumption in Article 115 (b) of the Statute,[123] limit the scope of investigations and the selection of cases in the context of ICC referrals. This exposes the Court to appearances of dependence or bias which affect the independence of the Court.[124] When the ICC required Council support to enforce warrants of arrest or deal with non-compliance by States with requests for cooperation, it has been largely left in the dark.[125] The Council notoriously failed to follow up on situations referred to the Court. Difficulties were reinforced by lack of transparency or explanation of key aspects of decisions, such as immunity exceptions or the use of Article 16.[126]

[121] See L. Arbour, 'Doctrines Derailed?: Internationalism's Uncertain Future', at http://www.crisisgroup.org/en/publication-type/speeches/2013/arbour-doctrines-derailed-internationalism-s-uncertain-future.aspx.

[122] See operative paragraph 6 of Resolution 1593 (2095) and 1970 (2011). For a discussion, see R. Cryer, 'Sudan, Resolution 1593, and International Criminal Justice' (2006) 19 *LJIL* 195; Trahan, (n 120 above).

[123] Article 115 (b) makes reference to "funds provided by the United Nations … in particular in relation to the expenses incurred due to referrals by the Security Council".

[124] On critiques by Arab and Latin and South American States against the role of the Council, see Schabas, (n 118 above). Similar reservations have been voiced in the context of the role of the Council in relation to the crime of aggression. As a result, it is made clear that a finding of the Council shall have no prejudicial effect on the ICC.

[125] See e.g.. most recently ICC, PTC I, *Prosecutor v. Saif Al-Islam Gaddafi*, ICC-01/11-01/11, Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council, 10 December 2014, para. 34 ("the Chamber is of the view that it is appropriate to make a finding of non-compliance by Libya with the Court's requests for cooperation at issue and refer the matter to the Security Council under article 87(7) of the Statute for it to consider any possible measure aimed at achieving Libya's compliance with its outstanding obligations *vis-à-vis* the Court").

[126] For an early illustration, see C. Stahn, The ambiguities of Security Council Resolution 1422 (2002) (2003) 14 *EJIL* 85–104.

As a result of these factors, there are serious doubts as to whether the coupling of collective security and international justice has been mutually reinforcing in the ICC context. Some of these concerns have been openly addressed by ICC Prosecutor Fatou Bensouda in December 2014. She noted in her statement on the situation in Darfur to the Council:

> It is becoming increasingly difficult for me to appear before you to update you when all I am doing is repeating the same things I have said over and over again, most of which are well known to this Council. …Women and girls continue to bear the brunt of sustained attacks on innocent civilians. But this Council is yet to be spurred into action. Victims of rapes are asking themselves how many more women should be brutally attacked for this Council to appreciate the magnitude of their plight …
>
> In the almost ten years that my Office has been reporting to this Council, there has never been a strategic recommendation provided to my Office, neither have there been any discussions resulting in concrete solutions for the problems we face in the Darfur situation. We find ourselves in a stalemate that can only embolden perpetrators to continue their brutality
>
> Faced with an environment where my Office's limited resources for investigations are already overstretched, and given this Council's lack of foresight on what should happen in Darfur, I am left with no choice but to hibernate investigative activities in Darfur as I shift resources to other urgent cases, especially those in which trial is approaching. It should thus be clear to this Council that unless there is a change of attitude and approach to Darfur in the near future, there shall continue to be little or nothing to report to you for the foreseeable future.[127]

Similar doubts exist in relation to the relationship between the Council and R2P. R2P was developed with the purpose to strengthen collective security and curtail unilateral use of force. This ambition has suffered from serious drawbacks. R2P has been declared "dead" after Syria.[128] But the problems may not lie so much in the under-utilization of R2P in relation to enforcement action, but in its instrumentalization.

From the perspective of systemic failure, Libya is in many ways a worse scenario for R2P than Syria. In the Libyan context, R2P was used in connection with the principle of the 'protection of civilians' to justify regime change.[129] This logic turned the protection rationale of

[127] See Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005), 12 December 2014, paras. 2–4, at http://www.icc-cpi.int/iccdocs/otp/stmt-20threport-darfur.pdf.

[128] See n 7 above.

[129] For a discussion, see M. Payandeh, 'The UN, Military Intervention, and Regime Change in Libya' (2012) 52 *Virginia Journal of International Law* 355; F. K. Abiew and N. Gal-Or, 'Libya, Intervention and Responsibility: Sawn of a new Era?, in C. Stahn and H. Melber (eds.), *Peace Diplomacy, Global Justice and Inter-*

R2P on its head. It used a humanitarian label and an agenda of protection to extend the limits of the use of force. It then ignored protection needs in the aftermath of military intervention. This behavior had a spin-over effect on international justice. It created the impression that the ICC is the ''prolonged arm'' of the Security Council and that its action is ''intervention by other means.'' [130] In this sense, it damaged both: international criminal justice and R2P.

4.3 *Use of Criminal Motives as a Justification for Intervention*

A third threat for the interplay between R2P and international criminal justice is use of criminal rationales as a pretext for intervention.[131] This may be an unintended consequence of the merger between justice and intervention agendas. It has detrimental effects on both concepts.

This tendency became acutely apparent in the Syrian crisis.[132] The discourse on the use of force mixed arguments of humanitarian protection, in line with R2P, and rationales of criminal justice in order to extend option for a military response. Humanitarianism was invoked as a title to justify action that is punitive in nature, outside the realm of self-defence[133] or collective security. Use of force was

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Footnote 129 continued
national Agency: Rethinking Human Security and Ethics in the Spirit of Dag Hammarskjöld (Cambridge: Cambridge University Press, 2014) 536–556.

[130] See Stahn, (n 117 above), and C. Stahn, 'Why the ICC Should Be Cautious to Use the Islamic State to Get Out of Africa: Part 1', EJIL Talk, at http://www.ejiltalk.org/why-the-icc-should-be-cautious-to-use-the-islamic-state-to-get-out-of-africa-part-1/.

[131] On narratives in intervention, see A. Orford, *Reading Humanitarian Intervention* (Cambridge: Cambridge University Press, 2003), C. Borgen, 'The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia' (2009) 10 *Chicago Journal of International Law* 1.

[132] For a full discussion, see C. Stahn, 'Syria and the Semantics of Intervention, Aggression and Punishment (2013) 11 *JICJ* 955, 957–960; C. Stahn, 'Between Law-breaking and Law-making: Syria, Humanitarian Intervention and ''What the Law Ought to Be''' (2014) 19 *Journal of Conflict and Security Law* 25–48.

[133] The use of chemical weapons marked a potential threat to international peace and security, but ''no armed attack'' under Article 51 UN Charter against any of the powers contemplating military intervention. There were also no direct effects on neighbouring countries which might justify the exercise of collective self-defence.

considered as an instrument to remove the threat of chemical weapons and to achieve retribution.[134]

The argument for intervention reversed methodologies. Instead of justifying calls for the use of international criminal justice, criminal notions and labels were used to justify recourse to force. This represents an attack on foundations of the international legal order and discredits R2P. R2P was not meant be a punitive concept. It is centered on the idea of protecting civilian populations, rather than sanctioning moral outrage, horror and fear caused through collective punishment.[135] Its development into a punitive tool, i.e. a "responsibility to punish" State action or inaction, stands partly in contrast to its humanitarian rationale and would increase fears of instrumentalization that have haunted the concept since its inception.[136]

This approach also weakens international criminal justice. Considerations of guilt and punishment have been associated with the responsibility of individuals, rather than State responsibility.[137] Incorporating arguments of punishment into intervention has detrimental effects. It collectives guilt and uses armed force as a short-cut to justice.

V END OF A LOVE AFFAIR AND THE ETHICS OF CARE

What implications do these developments have for the interplay between R2P and international criminal justice? Is it time to end the love affair?

In family law, a marriage without interaction may be a ground for divorce. This raises the questions whether a greater separation is desirable. A closer look at the *status quo* suggests that there is a need for both, greater distance to preserve autonomy, and a better con-

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[134] For a critique, see J. McMahan, 'Aggression and Punishment', in L. May (ed.), *War: Essays in Political Philosophy* (Cambridge: Cambridge University Press, 2012) 67, at 84 ("Aggressive war is just only when its aims are defensive … just war can be punitive only when the aim of punishment is defence or deterrence. Just war is never retributive").

[135] On the prohibition of collective punishment, see S. Darcy, 'Prosecuting the War Crime of Collective Punishment' (2010) 8 *JICJ* 29, S. Darcy, *Collective Responsibility and Accountability under International Law* (Ardsley, NY: Transnational Publishers, 2007) 7–185.

[136] See Mamdani, (n 5 above) (R2P as "right to punish").

[137] See generally B. I. Bonafé, *The Relationship Between State and Individual Responsibility for International Crimes* (Leiden: Brill, 2009).

nection in certain specific areas. A number of targeted considerations may help rethink the existing impasse.

First, too much emphasis may have been put since the outset on the strategic objective to make R2P operational as a concept within existing institutional clusters. The focus on implementation has detracted from the foundations of the concept, namely its capacity to strengthen the responsibility-related aspects of sovereignty. It is key to understand international criminal justice and R2P not as particular institutional models,[138] but as normative commitments. There is a need for a more careful return to the foundations. R2P offers an alternative reading to the 'social contract' theory in relation to the justification of public authority.[139] It provides a means to inquire more deeply into the social fabric and limitations of consent, including its representation and underlying conditions.[140] This normative foundation needs to be clarified better before further institutionalization or 'mainstreaming'. Otherwise R2P will remain a hollow shell.

Second, there is a need for a certain degree of modesty, in relation to both R2P and international criminal justice. In existing discourse (e.g., SG reports, prosecutorial strategy), it is too often assumed that R2P or justice intervention can solve root causes of conflict through institutional action or impact on rational cost/benefit analysis of individuals.[141] This assumption requires careful scrutiny. It tends to overestimate the role of international institutions in crisis. International institutions cannot be expected to create justice or security. They might at best mitigate insecurity and injustice. Lasting condi-

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[138] Chandler, (n 80 above), at 165. See also the critique by Nouwen, (n 9 above), at 64 (''the concepts correctly assume that states sometimes fail in fulfilling their responsibility to prosecute or to protect, they do not provide for the scenario that the 'international community' is equally, if not more, unwilling or unable'').

[139] See Dworkin, (n 3 above), at 10.

[140] See N. Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods' (2014) 108 *AJIL* 1.

[141] On alternatives to rationale choice in economic analysis, see World Bank, World Development Report 2015, *Mind, Society and Behaviour* (Washington: International Bank for Reconstruction and Development/The World Bank, 2015). The report stresses the ''human factor'' in decision-making, arguing that ''[i]ndividuals are not calculating automatons. Rather, people are malleable and emotional actors whose decision making is influenced by contextual cues, local social networks and social norms, and shared mental models. All of these play a role in determining what individuals perceive as desirable, possible, or even ''thinkable'' for their lives''. *Ibid.,* at 3.

tions can at best be created by choices that are made domestically or locally.[142] The application of R2P and international criminal justice strategies requires therefore further acts of translation. Moreover, what Nouwen qualified as the ''complementarity paradox'' also applies to the relationship between international criminal justice and R2P more broadly: In circumstances where the State is unable, the ''international community'' may often be ''even more, unwilling or unable'' to remedy flaws.[143]

Third, it is unhelpful to seek artificial complementarities between international criminal justice and R2P. There is need for more careful distinction between the humanitarian *telos* of R2P and the goals of international criminal justice. Rationales of protecting 'others' do not always coincide with the specific and individual-centered goals of criminal law. This difference between traditions has been aptly described by Jean Pictet, the main architect of the Geneva Conventions and its Additional Protocol, in his 1979 Commentary to the 'Fundamental Principles of the Red Cross':

> [W]hile justice rewards each person according to his rights, charity gives to each according to his suffering. To judge means to separate the good from the bad, the just from the unjust; to measure the degrees of individual responsibility. Charity on the other hand has nothing whatever to do with this kind of justice … It is more interested in providing people with what they need than it is with punishing them.[144]

The goals of international criminal justice should not be inflated.[145] International criminal justice is not directly meant to serve as conflict resolution mechanisms, nor is it necessarily a suitable instrument to facilitate the transition to a new political system, as claimed in some contexts (e.g., Kenya). It might introduce a new international approach to reduce violence or facilitate security or societal conditions. Such effects may well be a consequence of action. But they should not be turned into primary causes of action, since international criminal

[142] For such a claim in the transitional justice context, see R. Shaw and L. Waldorf (eds.), *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford: Stanford University Press, 2010).

[143] See Nouwen, (n 9 above), at 64.

[144] J. Pictet, *Commentary on the Fundamental Principles of the Red Cross* (International Federation of Red Cross and Red Crescent Societies, 1979) 22–23, at https://www.ifrc.org/PageFiles/40669/Pictet%20Commentary.pdf.

[145] C. Stahn, 'Between ''Faith'' and ''Facts'': By What Standards Should We Assess International Criminal Justice' (2012) 26 *LJIL* 251–282.

justice lacks the means to realize them. Claiming otherwise might place "the cart before the horse".

Fourth, the use of the atrocity crime trigger as a motivation or justification of human security action deserves further consideration. The crime label retains a certain pragmatic appeal because it provides identifiable thresholds. But it also has certain negative side effects that need to be addressed. Merging the semantics and concepts of criminal law into the working methods of human rights bodies or the justification of the use of force does not necessarily entail progress in relation to human security. It might be more helpful to develop a set of indicators for violations[146] and reliable methods to ascertain then, in order to provide specific guidance for humanitarian or human rights action.

Fifth, it is dangerous to portray international criminal justice institutions as enforcement tools of R2P. This functionalist logic is over-simplistic. It offers a wrong conceptualization of the relationship between international criminal justice and R2P. It blurs the distinction between international criminal justice and human rights instruments, or might facilitate its use as an instrument of 'war' by other means. International criminal justice requires thus a certain degree of autonomy. In future practice, it might be more helpful to identify and develop certain areas, in which the two concepts positively complement each other. Three of them are discussed briefly here: (i) the alert function of international criminal justice, (ii) its expressive value and (iii) compliance.

Monitoring capacity and atrocity alert is a first area where the interplay between R2P and international criminal justice could be developed. Over past years, preliminary examinations have turned into one of the most important aspect of ICC proceedings. ICC scrutiny has become an important factor in shaping dynamics of conflict.[147] In the drafting of the Statute, this aspect has only received minimal attention. One key challenge is to professionalize the conception and methodology of preliminary examinations. ICC pro-

[146] For a first initiative, see United Nations Office on Genocide Prevention and the Responsibility to Protect, 'Framework of Analysis for Atrocity Crimes: A Tool for Prevention', July 2014, at http://www.un.org/en/preventgenocide/adviser/pdf/framework%20of%20analysis%20for%20atrocity%20crimes_en.pdf.

[147] See T. Unger and M. Wierda, 'Pursuing Justice in Ongoing Conflict: A Discussion of Current Practice', in K. Ambos et al. (eds.), *Building a Future on Peace and Justice: Studies in Transitional Justice, Peace and Development* (Heidelberg/Berlin: Springer, 2009) 263.

ceedings might provide greater clarity and transparency on the context of violations that may give rise to R2P or serve as a critical compariter. At the same time, additional precaution needs to be taken to ensure that the absence of ICC action is not perceived as an implicit endorsement of conduct or as an indication of lack of gravity under R2P.

The expressive function of international criminal justice[148] is a second area where mutual engagement may be strengthened. Judgments and legal decisions have an important signal effect, by identifying rules and principles and 'do's and don'ts'. The World Summit Outcome Document formally entrusts the General Assembly with the task to "continue consideration of the responsibility to protect".[149] But in the absence of further regulatory action, jurisprudence may turn into one of the most important factors clarifying the rough edges of the R2P doctrine. In certain respects, such as the obligations of armed groups and state-like and other organizations,[150] it is more progressive[151] than R2P which largely ignored the responsibilities of non-state actors through the specific focus on responsibilities of the state. International criminal courts and tribunals, in turn, could rely more effectively on the normative consensus underlying the obligation-related side of R2P, in order to highlight positive duties (e.g., protection duties, access to humanitarian relief) or arbitrary denial of state consent.[152]

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[148] See e.g., R. D. Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Analogy and the Potential of International Criminal Law' (2007) 43 *Stanford Journal of International Law* 40. M. Drumbl, *Atrocity, Punishment and International Law* (Cambridge: Cambridge University Press, 2007) 173–180.

[149] See para. 139 of the World Summit Outcome Document.

[150] For discussion, see A. Clapham, 'Human Rights Obligations of Non-state Actors in Conflict Situations' (2006) 88 *IRRC* 491–523; W. A. Schabas, 'Punishment of Non-State Actors in Non-International Armed Conflict' (2003) 26 *Fordham International Law Journal* 907–933; G. Werle and B. Burghardt, 'Do Crimes Against Humanity Require Participation of a State or a 'State-like' Organization?' (2012) 10 *JICJ* 1151.

[151] See S. Darcy and J. Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press, 2010).

[152] On state consent and humanitarian assistance, see C. Ryngaert, 'Humanitarian Assistance and the Conundrum of Consent: A Legal Perspective' (2013) 5 *Amsterdam Law Forum* 5–19; R. Barber, 'Facilitating Humanitarian Assistance in International Humanitarian and Human Rights Law' (2009) 91 *IRRC* 386.

Compliance is a third area where synergies could be used in a more effective way. R2P could be invoked more systematically to draw attention to (i) non-cooperation by States in relation to arrest, (ii) need for follow-up by the Council or (iii) to put pressure on states to allow access to territory for investigations and prosecutions for core crimes. Interaction with the Security Council could be strengthened through adoption of a protocol, or the identification of general parameters, which would guide Council's actions in cases in which there are strong indications that the crimes under the Rome Statute are being committed and no domestic action is taken.[153] In the UN system, the Universal Periodic Review might be used as a venue to examine issues relating to implementation of specific statutory provisions, in order to promote effective domestic accountability for atrocity crimes.[154]

Sixth, both international criminal justice and R2P require further refinement in relation to agency. Protagonists of both projects assert authority on behalf of 'others'. They speak on their behalf and vest them with certain subjectivities, such as the label of 'victims'. This has opened them to criticism.[155] In R2P discourse, victims are frequently treated as homogenous entities (populations, civilians), without differentiation among interests or giving them any active voice. In the aftermath of responses, they are blended out of the picture. International criminal justice pays greater attention to the voice of victims in proceedings. But the argument that agency creates duties of care remains underdeveloped.[156] There is no clear exit strategy for the aftermath of investigations and prosecutions. Concerns of witnesses and victims often fall off the radar screen after testimony. Many victims are left out of the discourse due to the restricted scope of cases

[153] The Council Working Group on Tribunals could serve as a forum for dialogue on follow-up of referrals, including issues of non-cooperation. See also Trahan, (n 120 above).

[154] For a survey of the status quo, see CICC, 'Seeking Universality of the Rome Statute of the International Criminal Court Through the United Nations Human Rights', 9 May 2014, at http://www.iccnow.org/documents/ICC_at_the_UPR_19th_session_(28April-9May2014)_Outcome.pdf.

[155] Mégret, (n 9 above), at 49.

[156] See C. Barker, 'Who cares?: Dag Hammarskjöld and the Limits of Responsibility in International Law' in Stahn and Melber, (n 129 above) 508–535.

and collective representation.[157] This contradiction needs to be addressed. The more R2P and international criminal justice assert power on behalf of 'others', the more they need to strengthen the duty of care.

[157] See S. Kendall and S. Nouwen, 'Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood' (2014) 76 *Law and Contemporary Problems* 235–262.